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Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

SOUTHEAST MEDICAL CONSULTANTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3730(d)(1), Title 31, U.S. Code, which prescribes procedures for *qui tam* actions brought under the False Claims Act ("the FCA"), in pertinent part provides that:

> [I]f the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more that 25 percent *of the proceeds of the action or settlement of the claim*, depending upon the extent to which the person substantially contributed to the prosecution of the action . . . (Emphasis supplied)

Petitioner Southeast Medical Consultants, Inc. ("Southeast"), brought a *qui tam* action under the FCA against Coral Gables Hospital, Inc. ("the Hospital"), to recover excess Medicaid payments. Respondent United States of America ("the Government") intervened and settled the action for $3,630,000. The U.S. District Court for the Southern District of Florida calculated Southeast's allocation by referring to 15 percent of the claimed "federal settlement amount" (which claimed "federal settlement amount" was equivalent to 55 percent of the total settlement amount), rather than to 15 percent of the total settlement amount (the sum of the claimed "federal settlement amount" and the claimed "state settlement amount"). On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed.

The related questions presented are:

In a *qui tam* action brought under the FCA to recover excess Medicaid payments —

(1) For the purpose of calculating the relator's allocation, should the total settlement amount be regarded as (a) a unitary one for the sole benefit of the Government or (b) subject to apportionment between the Government and the participating [in the federally-subsidized Medicaid program] state?

(2) Is the Government the "real party in interest"?

(3) Does the United States Constitution's Appropriations Clause, Article I, § 9, cl. 7, in the absence of a congressional appropriation, bar the U.S. Department of Justice ("the DOJ") from apportioning the total settlement amount between the Government and the participating [in the federally-subsidized Medicaid program] state?

STATEMENT PURSUANT TO RULE 29.6

Southeast states that it has no corporate parents and that no publicly held company owns 10% or more of Southeast's stock.

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Southeast respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the U.S. District Court, Southern District of Florida, in Civil Action No. 95-641 (per Ungaro-Benages, D.J.) denying Southeast's motion for an allocation of the claimed "state settlement amount" (Appendix ("Pet. App.") is not published. The Court of Appeals' opinion in Case No. 00-17176 (per Tjoflat, Carnes and Hull, JJ.) affirming the order of the District Court (Pet. App. 1a) is not published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on March 30, 2001. Southeast invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the FCA, 31 U.S.C. §§ 3729, *et seq.*, relevant to this petition are reprinted in the Appendix at Pet. App. 10a.

STATEMENT OF THE CASE

Southeast, on March 29, 1995, commenced a *qui tam* action under the FCA against the Hospital to recover excess Medicaid payments which had been received during the years 1987 through 1989. The Complaint did not invoke Florida's statutory or common law.

Southeast complied with the FCA's notification requirements and the Government undertook an investigation of the Complaint's allegations. In addition, at the Government's request, the State of Florida Agency for Health Care Administration ("AHCA"), the agency responsible for the administration of the Florida Medicaid program, assigned its own personnel to the investigation. Over the next four years, Southeast's President, Mr. Donald J. Rahicki, assisted the AHCA employees who had been assigned to investigate the allegations of Southeast's *qui tam* Complaint against the Hospital.

At no time during the pendency of Civil Action No. 95-641 before the District Court did the State of Florida move for leave to intervene.

Early in November, 1999, a written Settlement Agreement ("the Settlement Agreement") was executed by the U.S. Department of Justice ("the DOJ"), the State of Florida, the Office of the Inspector General of the U.S. Department of Health and Human Services, the Hospital and Southeast. In the Settlement Agreement, the Hospital promised to pay $3,630,000 to discharge its liability for the excess Medicaid payments which it had received during the years 1987 through 1989.

In order to take possession of the $3,630,000 settlement proceeds, the parties to the Settlement Agreement temporarily "papered over" their dispute concerning Southeast's allocation. In ¶ 12 of the Settlement Agreement, the parties recited that the "federal settlement amount", representing the 55 percent of the Florida Medicaid program paid for by the Government, was $1,996,500 and that the "state settlement amount", representing the 45 percent of the Florida Medicaid

program paid for by the State of Florida, was $1,633,500.[1] However, at Southeast's insistence, the following language was inserted into ¶ 22 of the Settlement Agreement:

> Relator contends that it is also entitled to a share of between 15 and 25% of the state Settlement Amount, which totals $1,633,500. Further, Relator contends that Florida (a) is not a party to this action, (b) is not a proper signatory to this Agreement, and (c) in the absence of a congressional appropriation, is not entitled to receive a portion of the settlement proceeds.

The District Court, on November 19, 1999, entered its order dismissing Case No. 95-641 and retaining jurisdiction to enforce the Settlement Agreement.

Pursuant to their agreement, on December 3, 1999, the Government disbursed to Southeast the sum of $299,475 (equivalent to 15 percent of the claimed "federal settlement amount"), without prejudice to Southeast's right to seek a total allocation of $907,500 (equivalent to 25 percent of the "total settlement amount").

Southeast, on January 18, 2000, moved in the District Court for an order directing the Government to disburse to Southeast, from the settlement proceeds, the further sum of $245,025, equivalent to 15 percent of the claimed "state settlement amount". Although it was not a party to Civil Action No. 95-641, the State of Florida joined the Government in opposing Southeast's January 18, 2000, motion.

---

1. *See* 42 U.S.C. §§ 1301(a)(8) and 1396(b), which prescribe the formula for calculating the amount of the Government's contributions to the states' Medicaid programs.

The District Court, on July 10, 2000, entered an order denying Southeast's January 18, 2000, motion on the bases that:

> (a) under 31 U.S.C. § 3730(d)(1), Southeast's allocation is limited to the statutory percentage of the Government's damages sustained as a result of the Hospital's fraudulent acts, not the total proceeds of the action or settlement of the claim; and
>
> (b) the State of Florida had not waived its right to share in the recovery by failing to seek leave from the District Court to intervene in Civil Action No. 95-641.

The District Court, in its July 10, 2000, order, did not address Southeast's contention that, due to the absence of a congressional appropriation, the DOJ's apportionment of the settlement proceeds between the Government and the State of Florida violated the Appropriations Clause of the United States Constitution.

Southeast appealed. On March 30, 2001, the Eleventh Circuit affirmed on the basis of the District Court's July 10, 2000, order.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. In *Vermont Agency of Natural Resources v. United States of America ex rel. Stevens*, 529 U.S. 769 (2000) this Court noted that, under 31 U.S.C. § 3730(d)(1)-(2), the relator

> receives a share of *any* proceeds from the action-generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of which is reasonable) — plus attorney's fees and costs.

(Emphasis supplied) 529 U.S. at 769-770. As discussed below, the Eleventh Circuit's decision in this case conflicts with this Court's foregoing interpretation of the FCA, thereby warranting the issuance of this Court's writ of certiorari.

2. Until the Eleventh Circuit issued its decision in this case, the United States Courts of Appeals had unanimously held that the Government is the sole "real party in interest" in a *qui tam* action under the FCA to recover excess Medicaid payments. As discussed below, the Eleventh Circuit's approval of the DOJ's apportionment to the State of Florida of 45 percent of the settlement proceeds in this case conflicts with those holdings, thereby warranting the issuance of this Court's writ of certiorari.

3. Neither the District Court nor the Court of Appeals addressed Southeast's claim that, in the absence of a congressional appropriation, the DOJ's apportionment of the settlement proceeds between the Government and the State of Florida violates the U.S. Constitution's Appropriations Clause. As discussed below, the importance of that issue

warrants the issuance of this Court's writ of certiorari, following which this Court could either (a) address the merits of Southeast's constitutional claim or (b) remand this case to the Court of Appeals with an instruction so to do.

I. The Decision Below Conflicts With This Court's "Unitary" Construction Of 31 U.S.C. § 3730(d)(1) In *Vermont Agency of Natural Resources v. United States of America ex rel. Stevens*, 529 U.S. 765 (2000).

Section 3730(d)(1), Title 31, U.S. Code, in pertinent part provides that:

> [I]f the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more that 25 percent *of the proceeds of the action or settlement of the claim*, depending upon the extent to which the person substantially contributed to the prosecution of the action . . . (Emphasis supplied)

This Court, in *Vermont Agency of Natural Resources v. United States of America ex rel. Stevens, supra,* held that (a) the Government's injury in fact conferred standing on the relator to bring a *qui tam* action under the FCA and (b) the State of Vermont was not a "person" for purposes of *qui tam* liability. In describing the *qui tam* provisions of the FCA, this Court stated:

> An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant.

§ 3730(a). Second, as is relevant here, a private person (the "relator") may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § 3730(b)(1).

If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, § 3730(c)(2). If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only on a showing of "good cause." § 3730(c)(3). The relator receives a share of *any* proceeds from the action- generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable) — plus attorney's fees and costs. §§ 3730(d)(1)-(2). (Emphasis supplied)

529 U.S. at 769-770.

By declaring that a *qui tam* relator is entitled under the FCA to receive a share of "any" proceeds, this Court in *Vermont Agency of Natural Resources, supra,* confirmed

that, for purposes of 31 U.S.C. §§ 3730(d)(1)-(2), the Government's recovery is "unitary" and, by necessary inference, not subject to apportionment between the Government and someone other than the relator.

The Eleventh Circuit's decision in this case conflicts with this Court's understanding, as expressed in *Vermont Agency of Natural Resources, supra,* of the operation of 31 U.S.C. §§ 3730(d)(1)-(2). Instead of adhering to this Court's view that a *qui tam* relator shares in the Government's "unitary" recovery, the Eleventh Circuit, adopting the District Court's analysis, regarded the Government's recovery as "apportionable" for the purpose of calculating Southeast's share.

Because the Eleventh Circuit's decision in this case conflicts with the plain language of 31 U.S.C. §§ 3730(d)(1)-(2) and this Court's gloss thereon, Southeast's petition for writ of certiorari should be granted.

II. The Decision Below Conflicts With This Court's Decision In *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943), And The Decisions Of Other Circuits Holding That, In A *Qui Tam* Action Under The FCA To Recover Excess Medicaid Payments, The Government Is The Real Party In Interest.

In *United States ex rel. Marcus v. Hess, supra,* this Court held that, where contracts for electrical work on Public Works Administration projects had been made with local governmental units rather than the United States, but a substantial portion of the contractors' pay had come from the Federal Government's grants to the local governmental units, the contractors' conduct in conspiring to rig the bidding

on such projects was actionable under the FCA and authorized the "informer's" *qui tam* action against the contractors. Justice Black's opinion for this Court declared:

> We think the conduct of these respondents comes well within the prohibition of the statute which includes "every person who * * * causes to be presented, for payment * * * any claim upon or against the Government of the United States * * * knowing such claim to be * * * fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. The contracts found to have been induced by the respondents' frauds were made between them and local municipalities and school districts of Allegheny County, Pennsylvania. A large portion of the money paid the respondents under these contracts was federal in origin, granted by the Federal Public Works Administrator, an official of the United States. *40 U.S.C. § 401(a), 40 U.S.C.A. § 401(a).* The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from "competitive bidding." The bidding itself was a federal requirement; all bidders were fully advised that these were P.W.A. projects; and many if not most of the respondents certified that their bids were "genuine and not sham or collusive." While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P.W.A. forms which showed the

government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P.W.A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.

The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal — payment of government money to persons who had caused it to be defrauded.

Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid

> program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States." The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.
>
> The conclusion that the first clause of § 5438 includes this form of "causing to be presented" a "claim upon or against the Government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aiding to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination, or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government. (Footnotes omitted)

317 U.S. at 543-545.

In *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976), the District Court held that allegedly false claims submitted to the California Medicaid program constituted false claims against the Government for purposes of the FCA. That holding was codified in 1986 when Congress amended the FCA to include a new definition of "claim":

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). *See United States of America ex rel. Yesudian v. Howard University*, 332 U.S. App. D.C. 56, 62-63, 153 F.3d 731, 737-738 (1998).

In *United States of America ex rel. Minotti v. Lesink*, 895 F.2d 100, 104 (2d Cir. 1990), the Second Circuit declared:

> It is clearly established that although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action.

The Fourth Circuit, in *United States of America ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992), concurred.

In *United States of America ex rel. Woodard, Attorney General of the State of Colorado v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986), the Court of Appeals held that the State of Colorado, in its *qui tam* action under the FSA against a Medicaid provider, could assert a pendent claim of state common-law fraud to recover its portion of the overpayment.

Finally, in *United States of America ex rel. Flewelling v. DBB, Inc.*, 180 F.3d 1277, 1279 (11th Cir. 1999), involving alleged Medicare and Medicaid fraud, the Eleventh Circuit noted:

> The amended complaint seeks damages and civil penalties under the False Claims Act and injunctive relief under 18 U.S.C. § 1345 to prevent further dissipation of assets. *It also includes a claim by the State of Florida for a violation of the Florida False Claims Act, Fla. Stat. §§ 68.081 to 68.092, and state law claims for unjust enrichment, payment by mistake of fact, and breach of contract.* (Emphasis supplied)

In summary, until the Eleventh Circuit issued its decision in this case, it had been established that the Government is the real party in interest in a *qui tam* action under the FCA to recover excess Medicaid payments *unless the participating [in the federally-subsidized Medicaid program] state asserts a state-law based claim either by initiating, or intervening in, that action.*

Because the Eleventh Circuit's decision in this case constitutes a departure from, and creates a conflict with, that principle, Southeast's petition for writ of certiorari should be granted.

III. The Court Of Appeals' Decision Should Have Addressed Southeast's Claim That The DOJ's Apportionment Of The Total Settlement Amount Violated The Appropriations Clause, Article I, § 9, cl. 7 Of The United States Constitution.

In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), this Court held that (a) payments of money from the United States Treasury were limited to those authorized by statute and (b) erroneous advice given by a government employee to a benefits claimant could not estop the United States from denying benefits not otherwise permitted by law. Justice Kennedy's opinion for this Court stated:

> The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.

496 U.S. at 424.

The proceeds of the Government's settlement of Southeast's *qui tam* action against the Hospital under the FCA were wire transferred to the DOJ, which was obligated under 31 U.S.C. § 3302(c)(1)[2] to deposit those funds into

2. Section 3302(c)(1), Title 31, U.S. Code, provides:

> A person having custody or possession of public money, including a disbursing official having public money not

(Cont'd)

the Treasury. *See United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373 (E.D. Va. 1997). Under the Appropriations Clause, *supra*, those funds could be disbursed to Southeast and the State of Florida only if authorized by statute.

The FCA, 31 U.S.C. § 3730(d), authorizes the disbursement from the United States Treasury to Southeast of the latter's relator's allocation of the proceeds of the Government's settlement of Southeast's *qui tam* action against the Hospital. However, there exists no statute authorizing the disbursement from the from the United States Treasury to the State of Florida of a portion of the Government's recovery from the Hospital.

The non-existence of an appropriation directing the disbursement from the United States Treasury to the State of Florida of a portion of the proceeds realized from the Government's settlement of Southeast's *qui tam* action under the FCA against the Hospital triggers the prohibition embodied in the Constitution's Appropriations Clause. Stated simply, the Appropriations Clause bars the DOJ from sharing its recovery in this case with the State of Florida.

(Cont'd)

> for current expenditure, shall deposit the money without delay in the Treasury or with a depositary designated by the Secretary of the Treasury under law. Except as provided in paragraph (2), money required to be deposited pursuant to this subsection shall be deposited not later than the third day after the custodian receives the money. The Secretary or a depositary receiving a deposit shall issue duplicate receipts for the money deposited. The original receipt is for the Secretary and the duplicate is for the custodian.

Southeast advanced the foregoing argument in the District Court and the Court of Appeals and each tribunal ignored it. Because Southeast has called into question the constitutionality [under the Appropriations Clause] of the DOJ's administration of the *qui tam* provisions of the FCA, Southeast's petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 30, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-14176
Non-Argument Calendar

D.C. Docket No. 95-00641-CV-UUB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

SOUTHEAST MEDICAL CONSULTANTS, INC.,

Plaintiff-Appellant,

STATE OF FLORIDA,

Intervenor,

versus

CORAL GABLES HOSPITAL, INC.,
d.b.a. Coral Gables Hospital,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(March 30, 2001)

Before TJOFLAT, CARNES and HULL, Circuit Judges.

Appendix A

PER CURIAM:

Relator Southeast Medical Consultants, Inc. ("Southeast Medical") brought this qui tam False Claims Act action against Coral Gables Hospital, Inc., alleging that the hospital received Medicaid payments to which it was not entitled. The case was eventually settled in an agreement between the federal government, the State of Florida, Southeast Medical and Coral Gables Hospital that required the hospital to pay over $3.6 million to the federal government ($1,996,500) and the State of Florida ($1,633,500). Pursuant to 31 U.S.C. § 3730(d), Southeast Medical received 15% of the proceeds received by the federal government. Southeast Medical subsequently moved the district court to also award it a share of the proceeds received by the State of Florida. On January 18, 2000, the district court's denied Southeast Medical's motion after finding that the funds received by the State of Florida were not proceeds attributable to the federal False Claims Act claim but instead were funds paid to Florida in order to satisfy any claims that the State might otherwise assert. The district court also found that the federal government had no interest in the proceeds paid to the State of Florida. Southeast Medical appealed.

For the reasons contained in the district court's well-reasoned opinion, we AFFIRM.

APPENDIX B — ORDER DENYING RELATOR'S MOTION FOR FURTHER PARTIAL RELEASE OF SETTLEMENT PROCEEDS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED JULY 10, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-641-CIV-UNGARO-BENAGES

UNITED STATES OF AMERICA, *ex rel.* SOUTHEAST MEDICAL CONSULTANTS, INC.,

Plaintiffs,

vs.

CORAL GABLES HOSPITAL, INC.,

Defendant.

ORDER DENYING RELATOR'S MOTION FOR FURTHER PARTIAL RELEASE OF SETTLEMENT PROCEEDS

THIS CAUSE is before the Court upon Relator Southeast Medical Consultants, Inc.'s ("Southeast") Motion for Further Partial Release of Settlement Proceeds ("Motion for Further Partial Release"), filed January 18, 2000 and Relator's Motion for Leave to File a Supplemental Memorandum of Law in Support of its January 18, 2000 Motion for Further Partial Release of Settlement Proceeds, filed May 24, 2000.

Appendix B

THE COURT has considered the Motions, the pertinent portions of the record and is otherwise fully advised in the premises. On March 28, 1995, Relator Southeast filed this action against Defendant Coral Gables Hospital, Inc. (the "Hospital") under the *qui tam* provisions of the False Claims Act alleging that the Hospital had submitted fraudulent cost reports to the federal Medicaid program. After an investigation and settlement negotiations in which the State of Florida participated, on November 17, 1999, the United States intervened in the action for the purposes of settlement. On November 19, 1999, the Honorable Edward B. Davis[1] entered an Order dismissing the action pursuant to the United States' and Southeast's Stipulation of Dismissal and in accordance with the Settlement Agreement previously filed with the Court. The Court retained jurisdiction to enforce the provisions of the Settlement Agreement.

Under the terms of the Settlement Agreement, the Hospital was required to pay the sum of $3,630,000.00 (the "Settlement Amount") to the United States and the State of Florida. In this regard, the Agreement provided that $1,996,550.00 represents the portion of the settlement allocated to the federal share of Medicaid (the "Federal Settlement Amount") and that $1,633,500.00 represents the portion of the settlement allocated to the state share of Medicaid (the "State Settlement Amount").[2]

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1. This case was reassigned to the undersigned by Clerk's Order of Judicial Reassignment of a Closed Case, entered June 22, 2000.

2. As reflected in the portions of the Settlement Agreement quoted by Southeast, during the time the Hospital submitted (Cont'd)

Appendix B

On December 3, 1999, pursuant to §3730(d) of the *qui tam* provisions of the False Claims Act, the United States released to Southeast $299,475.00, representing 15% of the Federal Settlement Amount. Southeast files the instant Motion for Further Partial Release claiming that it is also entitled to the statutory minimum 15% of the State Settlement Amount.[3]

Southeast advances two arguments in support of its claim. First, Southeast argues that the False Claims Act authorizes a relator to receive a portion of a unitary monetary recovery and thus Southeast is entitled to 15% of the Settlement Amount, which includes the State Settlement Amount. Second, Southeast argues that the State of Florida has waived its right to share in the proceeds of the settlement and therefore the United States is entitled to the Settlement Amount and Southeast is entitled to 15% of that sum. Southeast's arguments are without merit.

Southeast points to § 3730(d)(1)'s reference to "proceeds of the action or settlement of the claim" to argue that it is entitled to a portion of a unitary monetary recovery and thus is entitled to the Settlement Amount, including the State

(Cont'd)
fraudulent costs reports to the Florida Medicaid program, the United States and the State of Florida provided 55% and 45% of the funds for the Florida Medicaid program, respectively. Consequently, the Federal Settlement Amount and State Settlement Amount represent 55% and 45% of the Settlement Amount, respectively.

3. Under § 3730(d)(1) of the False Claims Act, a relator is entitled to receive 15-25% "of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action."

Settlement Amount. However, the False Claims Act authorizes a relator to bring an action only for the damages sustained by the *federal* government as result of the proscribed acts of the defendant. *See* 31 U.S.C. § 3729(a)(1), (2), (7); §3730(b). Reading § 3730(d)(1) in conjunction with the remaining relevant provisions of the Act, § 3730(d)(1)'s reference to "proceeds of the action or settlement of the claim" can relate only to an amount representing the *federal* government's damages for the fraudulent acts of the defendant. Thus, Southeast's recovery pursuant to § 3730(d)(1) is limited to the statutory percentage of the United States' damages as a result of the Hospital's fraudulent acts, *i.e.* the Federal Settlement Amount.[4]

Other courts addressing this issue also have found that a state's share of a *qui tam* action settlement amount for false claims submitted to the state should not be considered in determining a False Claims Act relator's recovery. *See United States ex rel. Fox v. Northwest Nephrology Assoc., P.S.*, 87 F.Supp.2d 1103, 1110 (E.D. Wash. 2000) (holding that the relator's share should not come out of settlement funds to be paid to the State of Washington); *United States ex rel. Merena v. SmithKline Beecham* Corp., 52 F.Supp.2d 420, 439

4. In reaching this conclusion, the Court rejects Southeast's contention that § 3729(c) requires a conclusion to the contrary. Section 3729(c) simply provides that the false "claim" triggering a right to bring an action under the Act must be one in which the federal government provides some portion of the money or property that is requested. *See* 31 U.S.C. § 3729(c). It does not define the term "claim" as used in § 3730 nor does it otherwise suggest that a relator's entitlement to recovery pursuant to § 3730(d) should be a portion of any sums other than that to which the federal government has expended as a result of the false claim.

(E.D. Penn. 1998) (holding that relator's *qui tam* share of settlement proceeds would be calculated based only on proceeds actually received by federal government, excluding portion of settlement proceeds paid to states for settlement of their state medicare fraud claims).[5]

With respect to the second argument, Southeast contends that the State of Florida has waived its right to receive the State Settlement Amount because it did nothing to intervene in this action to formally prosecute a claim against the Hospital under the Florida False Claims Act. The Court is unpersuaded that this fact alone is sufficient to demonstrate a waiver of Southeast's entitlement to the State Settlement Amount or that even assuming the State of Florida's actions constitute such a waiver, the United States would be entitled to the State Settlement Amount, thereby entitling Southeast to a percentage of that amount.

It is undisputed that the State of Florida assigned an investigator/auditor to work with the United States to investigate the matter as it related to the State of Florida and participated in the settlement negotiations. As a result of these efforts, the State of Florida agreed to release its potential causes of action against the Hospital, in return for which the Hospital agreed to pay to the State of Florida a sum

5. The Court also rejects Southeast's reliance on *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 2000 WL 646252 (2000) (noting that a "relator's bounty is simply the fee he receives out of the *United States' recovery* for filing and/or prosecuting a successful action on behalf of the Government"). The issue of whether a relator's recovery under § 3730 includes a settlement amount owed to a state was not before the Court.

representing the state share of Medicaid funds fraudulently obtained, *i.e.* the State Settlement Amount. While it is true that the State of Florida did not formally assert a claim in the action, their efforts mirrored those of the United States in resolving any claims it had against the Hospital and obtaining a settlement in lieu of litigation. Moreover, there is no evidence that the United States, under the False Claims Act or otherwise, would be entitled to or would have pursued the sum represented by the State Settlement Amount. In short, Southeast's argument that the State Settlement Amount resulted from efforts unrelated to the claims in its *qui tam* action undercuts rather than supports its contention that it is entitled to a portion of that amount. *See United States v. Blue Cross and Blue Shield of Florida, Inc.*, 882 F.Supp. 166, 169 (M.D. Fla. 1995) (finding that sums resulting from the defendant's settlement of collateral claims with parties other than the United States were only incidental to the federal *qui tam* action and therefore should not be considered when determining the relators' recovery under § 3730(d)(1)). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion for Further Partial Release of Settlement Proceeds is DENIED. It is further

ORDERED AND ADJUDGED that the Motion for Leave to File a Supplemental Memorandum of Law in Support of its January 18, 2000 Motion for Further Partial Release of Settlement Proceeds is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of July, 2000.

Appendix B

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTES

31 U.S.C.A. § 3302

UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE
SUBTITLE III — FINANCIAL MANAGEMENT
CHAPTER 33 — DEPOSITING, KEEPING,
AND PAYING MONEY
SUBCHAPTER I — DEPOSITS AND DEPOSITARIES

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Current through P.L. 106-580, approved 12-29-00

§ 3302. Custodians of money

* * *

(c)(1) A person having custody or possession of public money, including a disbursing official having public money not for current expenditure, shall deposit the money without delay in the Treasury or with a depositary designated by the Secretary of the Treasury under law. Except as provided in paragraph (2), money required to be deposited pursuant to this subsection shall be deposited not later than the third day after the custodian receives the money. The Secretary or a depositary receiving a deposit shall issue duplicate receipts for the money deposited. The original receipt is for the Secretary and the duplicate is for the custodian.

(2) The Secretary of the Treasury may by regulation prescribe that a person having custody or possession of money required by this subsection to be deposited shall

deposit such money during a period of time that is greater or lesser than the period of time specified by the second sentence of paragraph (1).

* * * *

31 U.S.C.A. § 3729

UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE
SUBTITLE III — FINANCIAL MANAGEMENT
CHAPTER 37 — CLAIMS
SUBCHAPTER III — CLAIMS AGAINST THE UNITED STATES GOVERNMENT

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Current through P.L. 106-580, approved 12-29-00

§ 3729. False claims

* * *

(c) Claim defined. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will

reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

* * * *

31 U.S.C.A. § 3730

UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE
SUBTITLE III — FINANCIAL MANAGEMENT
CHAPTER 37 — CLAIMS
SUBCHAPTER III — CLAIMS AGAINST THE UNITED STATES GOVERNMENT

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Current through P.L. 106-580, approved 12-29-00

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. — (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action

may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

* * *

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions. — (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

* * *

Appendix C

(d) Award to qui tam plaintiff. — (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the First or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also

receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

* * * *